

**§ 169.112 How much monetary compensation must be paid for a right-of-way over or across individually owned Indian land?**

(a) A right-of-way over or across individually owned Indian land must require compensation of not less than fair market value, unless paragraph (b) or (c) of this section permit a lesser amount. Compensation may also include additional fees, including but not limited to throughput fees, severance damages, franchise fees, avoidance value, bonuses, or other factors. Compensation may be based on a fixed amount, a percentage of the projected income, or some other method. The grant must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made.

(b) We may approve a right-of-way over or across individually owned Indian land that provides for nominal compensation, or compensation less than a fair market value, if:

(1) The grantee is a utility cooperative and is providing a direct benefit to the Indian land; or

(2) The grantee is a tribal utility; or

(3) The individual Indian landowners execute a written waiver of the right to receive fair market value and we determine it is in the individual Indian landowners' best interest, based on factors including, but not limited to:

(i) The grantee is a member of the immediate family, as defined in § 169.2, of an individual Indian landowner;

(ii) The grantee is a co-owner in the affected tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the right-of-way; or

(iv) We have waived the requirement for a valuation under paragraph (d) of this section.

(c) We will require a valuation to determine fair market value, unless:

(1) 100 percent of the individual Indian landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (d) of this section.

(d) The grant must provide that the non-consenting individual Indian landowners, and those on whose behalf we have consented under § 169.108(c), or granted the right-of-way without consent under § 169.107(b), receive fair market value, as determined by a valuation, unless:

(1) The grantee is a utility cooperative and is providing a direct benefit to the Indian land; or

(2) The grantee is a tribal utility; or

(3) We waive the requirement because the tribe or grantee will construct infrastructure improvements benefitting the individual Indian landowners, and we determine in writ-

ing that the waiver is in the best interest of all the landowners.

**§ 169.113 Must a right-of-way grant for individually owned Indian land provide for compensation reviews or adjustments?**

(a) For a right-of-way grant of individually owned Indian land, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the grant unless:

(1) Payment is a one-time lump sum;

(2) The term of the right-of-way grant is 5 years or less;

(3) The grant provides for automatic adjustments; or

(4) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The right-of-way grant provides for payment of less than fair market value;

(ii) The right-of-way grant provides for most or all of the compensation to be paid during the first 5 years of the grant term or before the date the review would be conducted; or

(iii) The right-of-way grant provides for graduated rent or non-monetary or varying types of compensation.

(b) The grant must specify:

(1) When adjustments take effect;

(2) Who can make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(c) When a review results in the need for adjustment of compensation, the Indian landowners must consent to the adjustment in accordance with § 169.107, unless the grant provides otherwise.

**§ 169.114 How will BIA determine fair market value for a right-of-way?**

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market value before we grant a right-of-way over or across individually owned Indian land. We will also use a market analysis, appraisal, or other appropriate valuation method to determine, at the request of the tribe, the fair market value of tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Approve use of a market analysis, appraisal, or other appropriate valuation method from the Indian landowners or grantee.

(c) We will use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by

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the Secretary under 25 U.S.C. 2214 and complies with Departmental policies regarding appraisals, including third-party appraisals; or

(2) Has been prepared by another Federal agency.

### **§ 169.115 When are monetary compensation payments due under a right-of-way?**

Compensation for a right-of-way may be a one-time, lump sum payment, or may be paid in increments (for example, annually).

(a) If compensation is a one-time, lump sum payment, the grantee must make the payment by the date we grant the right-of-way, unless stated otherwise in the grant.

(b) If compensation is to be paid in increments, the right-of-way grant must specify the dates on which all payments are due. Payments are due at the time specified in the grant, regardless of whether the grantee receives an advance billing or other notice that a payment is due. Increments may not be more frequent than quarterly if payments are made to us on the Indian landowners' behalf.

### **§ 169.116 Must a right-of-way specify who receives monetary compensation payments?**

(a) A right-of-way grant must specify whether the grantee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The grantee may make payments directly to the tribe if the tribe so chooses. The grantee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered accounts;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the grantee at the start of the right-of-way.

(c) If the right-of-way document provides that the grantee will directly pay the Indian landowners, then:

(1) The right-of-way document must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the grantee must make payment to us on behalf of that landowner.

(3) The grantee must send direct payments to the parties and addresses specified in the right-of-way, unless the grantee receives notice of a change of ownership or address.

(4) Unless the right-of-way document provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the right-of-way, except that:

(i) The grantee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The grantee must make an individual Indian landowner's payment to us if that individual Indian landowner dies, is declared non compos mentis, owes a debt resulting in an encumbered account, or his or her whereabouts become unknown.

### **§ 169.117 What form of monetary compensation is acceptable under a right-of-way?**

(a) If payments are made to us on behalf of the Indian landowners, our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(b) We will not accept cash or foreign currency.

(c) We will accept third-party checks only from financial institutions or Federal agencies.

(d) The grant of right-of-way will specify the payment method if payments are made by direct pay.

### **§ 169.118 May the right-of-way provide for non-monetary or varying types of compensation?**

(a) A right-of-way grant may provide for alternative forms of compensation and varying types of compensation, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of compensation may include but are not limited to, in-kind consideration and payments based on throughput or percentage of income; or

(2) Varying types of compensation may include but are not limited to different types of payments at specific stages during the life of the right-of-way grant, such as fixed annual payments during construction, payments based on income during an operational period, and bonuses.

(b) For tribal land, we will defer to the tribe's determination that the compensation under paragraph (a) of this section is in its best interest, if the tribe submits a signed certification or tribal authorization stating that it has determined the alternative form of compensation or varying type of compensation to be in its best interest.

(c) For individually owned land, we may grant a right-of-way that provides for an alternative form of compensation or varying type of compensation if we determine that it is in the best interest of the Indian landowners.

**§ 169.119 Will BIA notify a grantee when a payment is due for a right-of-way?**

Upon request of the Indian landowners, we may issue invoices to a grantee in advance of the dates on which payments are due under the right-of-way. The grantee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

**§ 169.120 What other types of payments are required for a right-of-way?**

(a) The grantee may be required to pay additional fees, taxes, and assessments associated with the application for use of the land or use of the land, as determined by entities having jurisdiction, except as provided in § 169.11. The grantee must pay these amounts to the appropriate office, as applicable.

(b) In addition to, or as part of, the compensation for a right-of-way under §§ 169.110 and 169.112 and the payments provided for in paragraph (a) of this section, the applicant for a right-of-way will be required to pay for all damages to the land, such as those incident to the construction or maintenance of the facility for which the right-of-way is granted.

**§ 169.121 How will compensation be distributed among the life tenants and owners of the remainder interests?**

If a will created the life estate and specifies how the compensation will be distributed among the life tenants and owners of the remainder interests, those terms will establish the distribution. Otherwise:

(a) The owners of the remainder interests and the life tenant may enter into a right-of-way or other written agreement approved by the Secretary providing for the distribution of rent monies under the right-of-way; or

(b) If the owners of the remainder interests and life tenant did not enter into an agreement for distribution, the life tenant will receive payment in accordance with the distribution and calculation scheme set forth in part 179 of this chapter.

**§ 169.122 Who does the grantee pay if there is a life estate on the tract?**

The grantee must pay compensation directly to the life tenant under the terms of the right-of-way unless the whereabouts of the life tenant are unknown, in which case we may collect compensation on behalf of the life tenant.

## GRANTS OF RIGHTS-OF-WAY

**§ 169.123 What is the process for BIA to grant a right-of-way?**

(a) Before we grant a right-of-way, we must determine that the right-of-way is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the right-of-way application and supporting documents;

(2) Identify potential environmental impacts and adverse impacts, and ensure compliance with all applicable Federal environmental, land use, historic preservation, and cultural resource laws and ordinances; and

(3) Require any modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a right-of-way application, we will promptly notify the applicant whether the package is complete. A complete package includes all of the information and supporting documents required under this subpart, including but not limited to, an accurate legal description for each affected tract, documentation of landowner consent, NEPA review documentation and valuation documentation, where applicable.

(1) If the right-of-way application package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of an application package, the parties may take action under § 169.304.

(2) If the right-of-way application package is complete, we will notify the applicant of the date of our receipt of the complete package. Within 60 days of our receipt of a complete package, we will grant or deny the right-of-way, return the package for revision, or inform the applicant in writing that we need additional review time. If we inform the applicant in writing that we need additional time, then:

(i) Our letter informing the applicant that we need additional review time must identify our initial concerns and invite the applicant to respond within 15 days of the date of the letter; and

(ii) We will issue a written determination granting or denying the right-of-way within 30 days from sending the letter informing the applicant that we need additional time.

(c) If we do not meet the deadlines in this section, then the applicant may take appropriate action under § 169.304.

(d) We will provide any right-of-way denial and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter to the parties to the right-of-way. If the right-of-way is granted, we will provide a copy of the right-of-way to the tribal landowner and, upon written request, make copies available to the individual Indian landowners, and provide notice under § 169.12.

**§ 169.124 How will BIA determine whether to grant a right-of-way?**

Our decision to grant or deny a right-of-way will be in writing.

(a) We will grant a right-of-way unless:

(1) The requirements of this subpart have not been met, such as if the required landowner consent has not been obtained under § 169.107; or

(2) We find a compelling reason to withhold the grant in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the right-of-way is in their best interest.

(c) We may not unreasonably withhold our grant of a right-of-way.

(d) We may grant one right-of-way for all of the tracts traversed by the right-of-way, or we may issue separate grants for one or more tracts traversed by the right-of-way.

**§ 169.125 What will the grant of right-of-way contain?**

(a) The grant will incorporate the conditions or restrictions set out in the Indian landowners' consents.

(b) The grant will address:

(1) The use(s) the grant is authorizing;

(2) Whether assignment of the right-of-way is permitted and, if so, whether additional consent is required for the assignment and whether any additional compensation is owed to the landowners;

(3) Whether mortgaging of the right-of-way is permitted and, if so, whether additional consent is required for the mortgage and whether any additional compensation is owed to the landowners; and

(4) Ownership of permanent improvements under § 169.130.

(c) The grant will state that:

(1) The tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way under § 169.10 and reserves the right of the tribe to reasonable access to the lands subject to the grant to determine grantee's compliance with consent conditions or to protect public health and safety;

(2) The grantee has no right to any of the products or resources of the land, including but not limited to, timber, forage, mineral, and animal resources, unless otherwise provided for in the grant;

(3) BIA may treat any provision of a grant that violates Federal law as a violation of the grant; and

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this grant, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the grantee will contact BIA and the tribe with jurisdiction over the land to determine how to proceed and appropriate disposition.

(5) The grantee must:

(i) Construct and maintain improvements within the right-of-way in a professional manner consistent with industry standards;

(ii) Pay promptly all damages and compensation, in addition to bond or alternative form of security made pursuant to § 169.103,

determined by the BIA to be due the landowners and authorized users and occupants of land as a result of the granting, construction, and maintenance of the right-of-way;

(iii) Restore the land as nearly as may be possible to its original condition, upon the completion of construction, to the extent compatible with the purpose for which the right-of-way was granted, or reclaim the land if agreed to by the landowners;

(iv) Clear and keep clear the land within the right-of-way, to the extent compatible with the purpose of the right-of-way, and dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project;

(v) Comply with all applicable laws and obtain all required permits;

(vi) Not commit waste;

(vii) Operate, repair and maintain improvements consistent with the right-of-way grant;

(viii) Build and maintain necessary and suitable crossings for all roads and trails that intersect the improvements constructed, maintained, or operated under the right-of-way;

(ix) Restore the land to its original condition, to the maximum extent reasonably possible, upon cancellation or termination of the right-of-way, or reclaim the land if agreed to by the landowners;

(x) At all times keep the BIA, and the tribe for tribal land, informed of the grantee's address;

(xi) Refrain from interfering with the landowner's use of the land, provided that the landowner's use of the land is not inconsistent with the right-of-way;

(xii) Comply with due diligence requirements under § 169.105; and

(xiii) Notify the BIA, and the tribe for tribal land, if it files for bankruptcy or is placed in receivership.

(6) Unless the grantee would be prohibited by law from doing so, the grantee must also:

(i) Hold the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the applicant's use or occupation of the premises; and

(ii) Indemnify the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or release or discharge of any hazardous material from the premises that occurs during the term of the grant, regardless of fault, with the exception that the applicant is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(d) The grant must attach or include by reference maps of definite location.

**§ 169.126 May a right-of-way contain a preference consistent with tribal law for employment of tribal members?**

A grant of right-of-way over or across Indian land may include a provision, consistent with tribal law, requiring the grantee to give a preference to qualified tribal members, based on their political affiliation with the tribe.

**§ 169.127 Is a new right-of-way grant required for a new use within or overlapping an existing right-of-way?**

(a) If you are the grantee, you may use all or a portion of an existing right-of-way for a use not specified in the original grant of the existing right-of-way only if it is within the same scope of the use specified in the original grant of the existing right-of-way.

(1) If you propose to use all or a portion of an existing right-of-way for a use not specified in the original grant of the existing right-of-way and not within the same scope of the use specified in the original grant of the existing right-of-way, and the new use will not require any ground disturbance, you must request an amendment to the existing right-of-way grant.

(2) If you propose to use all or a portion of an existing right-of-way for a use not specified in the original grant of the existing right-of-way and not within the same scope of the use specified in the original grant of the existing right-of-way, and the new use requires ground disturbance, you must request a new right-of-way.

(b) If you are not the grantee:

(1) You may use all or a portion of an existing right-of-way for a use specified in the original grant of the existing right-of-way or a use within the same scope of the use specified in the original grant of the existing right-of-way if the grantee obtains an assignment to authorize the new user; or

(2) You may use all or a portion of an existing right-of-way for a use not specified in the original grant of the existing right-of-way and not within the same scope of use specified in the original grant of the existing right-of-way if you request a new right-of-way within or overlapping the existing right-of-way for the new use.

(c) An example of a use within the same scope is a right-of-way for underground telephone line being used for an underground fiber optic line, and an example of a use that is not within the same scope is a right-of-way for a pipeline being used for a road or railroad.

**§ 169.128 When will BIA grant a right-of-way for a new use within or overlapping an existing right-of-way?**

We may grant a new right-of-way within or overlapping an existing right-of-way if it meets the following conditions:

(a) The applicant follows the procedures and requirements in this part to obtain a new right-of-way.

(b) The new right-of-way does not interfere with the use or purpose of the existing right-of-way and the applicant has obtained the consent of the existing right-of-way grantee. The existing right-of-way grantee may not unreasonably withhold consent.

**§ 169.129 What is required if the location described in the original application and grant differs from the construction location?**

(a) If engineering or other complications prevented construction within the location identified in the original application and grant, and required a minor deviation from the location identified in the original application and grant, then we and the tribe, for tribal land, will determine whether the change in location requires one or more of the following:

- (1) An amended map of definite location;
- (2) Landowner consent;
- (3) A valuation or, with landowner consent, a recalculation of compensation;
- (4) Additional compensation or security; or
- (5) Other actions required to comply with applicable laws.

(b) If BIA and the tribe, for tribal land, determine it is not a minor deviation in location, we may require a new right-of-way grant or amendment to the right-of-way grant.

(c) If we grant a right-of-way for the new route or location, the applicant must execute instruments to extinguish, or amend, as appropriate, the right-of-way at the original location identified in the application.

(d) We will transmit the instruments to extinguish or amend the right-of-way to the LTRO for recording.

**§ 169.130 Must a right-of-way grant address ownership of permanent improvements?**

(a) A right-of-way grant must specify who will own any permanent improvements the grantee constructs during the grant term and may specify under what conditions, if any, permanent improvements the grantee constructs may be conveyed to the Indian landowners during the grant term. In addition, the grant may indicate whether each specific permanent improvement the grantee constructs will:

(1) Remain on the premises, upon the expiration, cancellation, or termination of the grant, in a condition satisfactory to the Indian landowners, and become the property of the Indian landowners;

(2) Be removed within a time period specified in the grant, at the grantee's expense, with the premises to be restored as closely as possible to their condition before construction of the permanent improvements; or

(3) Be disposed of by other specified means.

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(b) A grant that requires the grantee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

### Subpart D—Duration, Renewals, Amendments, Assignments, Mortgages

#### DURATION & RENEWALS

##### **§ 169.201 How long may the duration of a right-of-way grant be?**

(a) All rights-of-way granted under this part are limited to the time periods stated in the grant.

(b) For tribal land, we will defer to the tribe's determination that the right-of-way term is reasonable.

(c) For individually owned Indian land, we will review the right-of-way duration to ensure that it is reasonable, given the purpose of the right-of-way. We will generally consider a maximum duration of 20 years to be reasonable for the initial term for rights-of-way for oil and gas purposes and a maximum of 50 years, inclusive of the initial term and any renewals, to be reasonable for rights-of-way for all other purposes. We will consider a duration consistent with use to be reasonable for rights-of-way for conservation easements. We will consider durations different from these guidelines if a different duration would benefit the Indian landowners, is required by another Federal agency, or the tribe has negotiated for a different duration and the right-of-way crosses tribal land.

##### **§ 169.202 Under what circumstances will a grant of right-of-way be renewed?**

A renewal is an extension of term of an existing right-of-way without any other change.

(a) The grantee may request a renewal of an existing right-of-way grant and we will renew the grant as long as:

(1) The initial term and renewal terms, together, do not exceed the maximum term determined to be reasonable under § 169.201;

(2) The existing right-of-way grant explicitly allows for automatic renewal or an option to renew and specifies compensation owed to the landowners upon renewal or how compensation will be determined;

(3) The grantee provides us with a signed affidavit that there is no change in size, type, or location, of the right-of-way;

(4) The initial term has not yet ended;

(5) No uncured violation exists regarding the regulations in this part or the grant's conditions or restrictions; and

(6) The grantee provides confirmation that landowner consent has been obtained, or if consent is not required because the original

right-of-way grant explicitly allows for renewal without the owners' consent, the grantee provides notice to the landowners of the renewal.

(b) We will record any renewal of a right-of-way grant in the LTRO.

(c) If the proposed renewal involves any change to the original grant or the original grant was silent as to renewals, the grantee must reapply for a new right-of-way, in accordance with § 169.101, and we will handle the application for renewal as an original application for a right-of-way.

##### **§ 169.203 May a right-of-way be renewed multiple times?**

There is no prohibition on renewing a right-of-way multiple times, unless the grant expressly prohibits multiple renewals, and subject to the duration limitations for individually owned land in § 169.201. The provisions of § 169.202 apply to each renewal.

#### AMENDMENTS

##### **§ 169.204 May a grantee amend a right-of-way?**

(a) An amendment is required to change any provisions of a right-of-way grant. If the change is a material change to the grant, we may require application for a new right-of-way instead.

(b) A grantee may request that we amend a right-of-way to make an administrative modification (*i.e.*, a modification that is clerical in nature, for example to correct the legal description) without meeting consent requirements, as long as the grantee provides landowners with written notice. For all other amendments, the grantee must meet the consent requirements in § 169.107 and obtain our approval.

##### **§ 169.205 What is the approval process for an amendment of a right-of-way?**

(a) When we receive an amendment for our approval, we will notify the grantee of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation (including but not limited to a corrected legal description, if any, and NEPA compliance) to approve or disapprove the amendment. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) If we need additional time to review, our letter informing the parties that we need additional time for review must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the grantee or Indian landowners may take appropriate action under §169.304.

**§169.206 How will BIA decide whether to approve an amendment of a right-of-way?**

(a) We may disapprove a request for an amendment of a right-of-way only if at least one of the following is true:

(1) The Indian landowners have not consented to the amendment under §169.107 and we have not consented on their behalf under §169.108;

(2) The grantee's sureties for the bonds or alternative securities have not consented;

(3) The grantee is in violation of the right-of-way grant;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

ASSIGNMENTS

**§169.207 May a grantee assign a right-of-way?**

(a) A grantee may assign a right-of-way by:

(1) Meeting the consent requirements in §169.107, unless the grant expressly allows for assignments without further consent; and

(2) Either obtaining our approval, or meeting the conditions in paragraph (b) of this section.

(b) A grantee may assign a right-of-way without BIA approval only if:

(1) The original right-of-way grant expressly allows for assignment without BIA approval; and

(2) The assignee and grantee provide a copy of the assignment and supporting documentation to BIA for recording in the LTRO within 30 days of the assignment.

(c) Assignments that are the result of a corporate merger, acquisition, or transfer by operation of law are excluded from these requirements, except for the requirement to provide a copy of the assignment and supporting documentation to BIA for recording in the LTRO within 30 days and to the tribe for tribal land.

**§169.208 What is the approval process for an assignment of a right-of-way?**

(a) When we receive an assignment for our approval, we will notify the grantee of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of any required

consents, and any required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the grantee or Indian landowners may take appropriate action under §169.304.

**§169.209 How will BIA decide whether to approve an assignment of a right-of-way?**

(a) We may disapprove an assignment of a right-of-way only if at least one of the following is true:

(1) The Indian landowners have not consented to the assignment under §169.107 and their consent is required;

(2) Sufficient bonding and/or insurance are not in place;

(3) The grantee is in violation of the right-of-way grant;

(4) The assignee does not agree to be bound by the terms of the right-of-way grant;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(c) We may not unreasonably withhold approval of an assignment.

MORTGAGES

**§169.210 May a grantee mortgage a right-of-way?**

A grantee may mortgage a right-of-way, if the grant expressly allows mortgaging. The grantee must meet the consent requirements in §169.107, unless the grant expressly allows for mortgaging without consent, and must obtain our approval for the mortgage.

**§169.211 What is the approval process for a mortgage of a right-of-way?**

(a) When we receive a right-of-way mortgage for our approval, we will notify the grantee of the date we receive it. We have 30 days from receipt of the executed mortgage, proof of required consents, and required documentation to approve or disapprove the mortgage. Our determination whether to approve the mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the grantee or Indian landowners may take appropriate action under §169.304.

**§169.212 How will BIA decide whether to approve a mortgage of a right-of-way?**

(a) We may disapprove a right-of-way mortgage only if at least one of the following is true:

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(1) The Indian landowners have not consented;

(2) The grantee's sureties for the bonds have not consented;

(3) The requirements of this subpart have not been met; or

(4) We find a compelling reason to withhold approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we may consider whether:

(1) The mortgage proceeds would be used for purposes unrelated to the right-of-way purpose; and

(2) The mortgage is limited to the right-of-way.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a right-of-way mortgage.

### Subpart E—Effectiveness

#### **§ 169.301 When will a right-of-way document be effective?**

(a) A right-of-way document will be effective on the date we approve the right-of-way document, even if an appeal is filed under part 2 of this chapter.

(b) The right-of-way document may specify a date on which the grantee's obligations are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

#### **§ 169.302 Must a right-of-way be recorded?**

(a) Any right-of-way document must be recorded in our LTRO with jurisdiction over the affected Indian land.

(1) We will record the right-of-way document immediately following our approval or granting.

(2) In the case of assignments that do not require our approval under § 169.207(b), the parties must provide us with a copy of the assignment and we will record the assignment in the LTRO with jurisdiction over the affected Indian land.

(b) The tribe must record right-of-way documents for the following types of rights-of-way in the LTRO with jurisdiction over the affected Indian lands, even though BIA approval is not required:

(1) Grants on tribal land for a tribal utility under § 169.4;

(2) Grants on tribal land under a special act of Congress authorizing grants without our approval under certain conditions.

#### **§ 169.303 What happens if BIA denies a right-of-way document?**

If we deny the right-of-way grant, renewal, amendment, assignment, or mortgage, we will notify the parties immediately and advise

the landowners and the applicant of their right to appeal the decision under part 2 of this chapter.

#### **§ 169.304 What happens if BIA does not meet a deadline for issuing a decision on a right-of-way document?**

(a) If a Superintendent does not meet a deadline for granting or denying a right-of-way, renewal, amendment, assignment, or mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Grant or deny the right-of-way; or

(2) Order the Superintendent to grant or deny the right-of-way within the time set out in the order.

(c) Either party may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not grant or deny the right-of-way within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the right-of-way, renewal, amendment, assignment, or mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Grant or deny the right-of-way; or

(2) Order the Regional Director or Superintendent to grant or deny the right-of-way within the time set out in the order.

(e) If the Regional Director or Superintendent does not grant or deny the right-of-way within the time set out in the order under paragraph (d)(2) of this section, then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the BIA Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a granting or denying a right-of-way, renewal, amendment, assignment, or mortgage under this subpart.

#### **§ 169.305 Will BIA require an appeal bond for an appeal of a decision on a right-of-way document?**

(a) If a party appeals our decision on a right-of-way document, then the official to whom the appeal is made may require the appellant to post an appeal bond in accordance with part 2 of this chapter. We will not require an appeal bond if the tribe is a party to the appeal and requests a waiver of the appeal bond.



(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

### **Subpart F—Compliance and Enforcement**

#### **§ 169.401 What is the purpose and scope of this subpart?**

This subpart describes the procedures we use to address compliance and enforcement related to rights-of-way on Indian land. Any abandonment, non-use, or violation of the right-of-way grant or right-of-way document, including but not limited to encroachments beyond the defined boundaries, accidental, willful, and/or incidental trespass, unauthorized new construction, changes in use not permitted in the grant, and late or insufficient payment may result in enforcement actions including, but not limited to, cancellation of the grant.

#### **§ 169.402 Who may investigate compliance with a right-of-way?**

(a) BIA may investigate compliance with a right-of-way.

(1) If an Indian landowner notifies us that a specific abandonment, non-use, or violation has occurred, we will promptly initiate an appropriate investigation.

(2) We may enter the Indian land subject to a right-of-way at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable grant documents, to protect the interests of the Indian landowners and to determine if the grantee is in compliance with the requirements of the right-of-way.

(b) The tribe with jurisdiction may investigate compliance consistent with tribal law.

#### **§ 169.403 May a right-of-way provide for negotiated remedies?**

(a) The tribe and the grantee on tribal land may negotiate remedies for a violation, abandonment, or non-use. The negotiated remedies must be stated in the tribe's consent to the right-of-way grant, which BIA will then incorporate into the grant itself. The negotiated remedies may include, but are not limited to, the power to terminate the right-of-way grant. If the negotiated remedies provide one or both parties with the power to terminate the grant:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The tribe must provide us with written notice of the termination so that we may record it in the LTRO.

(b) The Indian landowners and the grantee to a right-of-way grant on individually owned Indian land may negotiate remedies, so long as the consent also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the majority interest under § 169.107. If the negotiated remedies provide one or both parties with the power to terminate the grant:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any surety of any violation that may result in termination and the termination of a right-of-way.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the right-of-way grant. The landowners may request our assistance in enforcing negotiated remedies.

(e) A right-of-way grant may provide that violations will be addressed by a tribe, and that disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

#### **§ 169.404 What will BIA do about a violation of a right-of-way grant?**

(a) In the absence of actions or proceedings described in § 169.403 (negotiated remedies), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section. We will consult with the tribe for tribal land or, where feasible, communicate with Indian landowners for individually owned Indian land, and determine whether a violation has occurred.

(b) If we determine there has been a violation of the conditions of a grant, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the grantee a written notice of violation.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the grantee that, within 10 business days of the receipt of a notice of violation, the grantee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

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(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the grantee to cease operations under the right-of-way grant.

(c) A grantee's failure to pay compensation in the time and manner required by a right-of-way grant is a violation, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the grantees a written notice of violation promptly following the date on which the payment was due.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the grantee to provide adequate proof of payment.

(d) The grantee will continue to be responsible for the obligations in the grant until the grant expires, or is terminated or cancelled, as well as any reclamation or other obligations that survive the end of the grant.

**§ 169.405 What will BIA do if the grantee does not cure a violation of a right-of-way grant on time?**

(a) If the grantee does not cure a violation of a right-of-way grant within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, communicate with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the grant;

(2) The Indian landowners wish to invoke any remedies available to them under the grant;

(3) We should invoke other remedies available under the grant or applicable law, including collection on any available bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

(4) The grantee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, communication with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We need not cancel the grant or give any further notice to the grantee before taking action to recover unpaid compensation.

(2) We may take action to recover any unpaid compensation even though we cancel the grant.

(c) If we decide to cancel the grant, we will send the grantee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send

a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the grantee of the amount of any unpaid compensation or late payment charges due under the grant;

(3) Notify the grantee of the grantee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the grantee to post an appeal bond;

(4) Order the grantee to vacate the property within the timeframe reflected in the termination terms of the grant, or within 31 days of the date of receipt of the cancellation letter, or within such longer period of time in extraordinary circumstances considering the protection of trust resources and the best interest of the Indian landowners, if an appeal is not filed by that time; and

(5) Order the grantee to take any other action BIA deems necessary to protect the Indian land.

(d) We may invoke any other remedies available to us under the grant, including collecting on any available bond, and the Indian landowners may pursue any available remedies under tribal law.

(e) We will issue an appropriate instrument cancelling the right-of-way and transmit it to the LTRO pursuant to 25 CFR part 150 for recording and filing.

**§ 169.406 Will late payment charges, penalties, or special fees apply to delinquent payments due under a right-of-way grant?**

(a) Late payment charges and penalties will apply as specified in the grant. The failure to pay these amounts will be treated as a violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to the late payment charges that must be paid to the Indian landowners under the grant:

The grantee will pay . . .	For . . .
(1) \$50.00 .....	Any dishonored check.
(2) \$15.00 .....	Processing of each notice or demand letter.
(3) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

**§ 169.407 How will payment rights relating to a right-of-way grant be allocated?**

The right-of-way grant may allocate rights to payment for any proceeds, trespass damages, condemnation awards, settlement

funds, and other payments between the Indian landowners and the grantee. If not specified in the grant, applicable policy, order, award, judgment, or other document, the Indian landowners will be entitled to receive these payments.

**§ 169.408 What is the process for cancelling a right-of-way for non-use or abandonment?**

(a) We may cancel, in whole or in part, any rights-of-way granted under this part 30 days after mailing written notice to the grantee at its latest address, for a nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted. If the grantee fails to correct the basis for cancellation by the 30th day after we mailed the notice, we will issue an appropriate instrument cancelling the right-of-way and transmit it to the LTRO pursuant to part 150 of this chapter for recording and filing.

(b) We may cancel, in whole or in part, any rights-of-way granted under this part immediately upon abandonment of the right-of-way by the grantee. We will issue an appropriate instrument cancelling the right-of-way and transmit it to the LTRO pursuant to part 150 of this chapter for recording and filing.

(c) The cancellation notice will notify the grantee of the grantee's right to appeal under part 2 of this chapter, including the possibility of that the official to whom the appeal is made will require the grantee to post an appeal bond.

**§ 169.409 When will a cancellation of a right-of-way grant be effective?**

(a) A cancellation involving a right-of-way grant will not be effective until 31 days after the grantee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. When a cancellation decision is not immediately effective, the grantee must continue to pay compensation and comply with the other terms of the grant.

**§ 169.410 What will BIA do if a grantee remains in possession after a right-of-way expires or is terminated or cancelled?**

If a grantee remains in possession after the expiration, termination, or cancellation of a right-of-way, and is not accessing the land to perform reclamation or other remaining grant obligations, we may treat the unauthorized possession as a trespass under applicable law and will communicate with the Indian landowners in making the determination whether to treat the unauthorized possession as a trespass. Unless the parties have notified us in writing that they are engaged

in good faith negotiations to renew or obtain a new right-of-way, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action. The holdover time will be charged against the new term.

**§ 169.411 Will BIA appeal bond regulations apply to cancellation decisions involving right-of-way grants?**

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will govern appeals from right-of-way cancellation decisions.

(b) The grantee may not appeal the appeal bond decision. The grantee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§ 169.412 When will BIA issue a decision on an appeal from a right-of-way decision?**

BIA will issue a decision on an appeal from a right-of-way decision within 60 days of receipt of all pleadings.

**§ 169.413 What if an individual or entity takes possession of or uses Indian land or BIA land without a right-of-way or other proper authorization?**

If an individual or entity takes possession of, or uses, Indian land or BIA land without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass. An unauthorized use within an existing right-of-way is also a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law, including applicable tribal law.

**§ 169.414 May BIA take emergency action if Indian land is threatened?**

(a) We may take appropriate emergency action if there is a natural disaster or if an individual or entity causes or threatens to cause immediate and significant harm to Indian land or BIA land. Emergency action may include judicial action seeking immediate cessation of the activity resulting in or threatening the harm.

(b) We will make reasonable efforts to notify the individual Indian landowners before and after taking emergency action on Indian land. In all cases, we will notify the Indian landowners after taking emergency action on Indian land. We will provide written notification of our action to the Indian tribe exercising jurisdiction over the Indian land before and after taking emergency action on Indian land.

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### **§ 169.415 How will BIA conduct compliance and enforcement when there is a life estate on the tract?**

(a) We may monitor the use of the land, as appropriate, and will enforce the terms of the right-of-way on behalf of the owners of the remainder interests, but will not be responsible for enforcing the right-of-way on behalf of the life tenant.

(b) The life tenant may not cause or allow permanent injury to the land.

## **PART 170—INDIAN RESERVATION ROADS PROGRAM**

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